(3)

No. 91-848

In the Supreme Court of the United States

OCTOBER TERM, 1991

ROANOKE RIVER BASIN ASSOCIATION
AND STATE OF NORTH CAROLINA, PETITIONERS

v.

RONALD E. HUDSON,
NORFOLK DISTRICT ENGINEER, AND
CITY OF NORFOLK BEACH, VIRGINIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Army Corps of Engineers was required by the National Environmental Policy Act to prepare an environmental impact statement before issuing a permit to the City of Virginia Beach to construct a water supply pipeline from Lake Gaston.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 940 F.2d 58. The opinions of the district court (Pet. App. 29a-73a, 75a-152a) are reported at 731 F. Supp. 1261 and 665 F. Supp. 428.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1991. The petition for rehearing was denied on August 20, 1991. The petition for a writ of certiorari was filed on November 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 102 of the National Environmental Policy Act (NEPA) requires federal agencies to prepare an environmental impact statement (EIS) for all federal actions significantly affecting the quality of the human environment. 42 U.S.C. 4332. Under regulations implementing NEPA promulgated by the Council on Environmental Quality (CEQ), the agency ordinarily prepares an environmental assessment (EA) to evaluate whether a project will have an effect that is significant enough to warrant preparation of an EIS. 40 C.F.R. 1501.4(a) and (b); 40 C.F.R. 1508.9(a)(1). If, on the basis of the EA, the agency determines that an EIS is not required, it then prepares a finding of no significant impact (FONSI), 40 C.F.R. 1501.4(c), which must be made available to the public. 40 C.F.R. 1501.4(e)(1).

This case arises from the Army Corps of Engineers' decision to issue a permit to the City of Virginia Beach, Virginia, allowing the construction of a water intake facility and pipeline from Lake Gaston in southwestern Virginia on the North Carolina border, and the execution of a contract for the storage of water in Kerr Reservoir, upstream of Lake Gaston. Pet. App. 75a. Petitioners challenged the Army Corps of Engineers' decision to issue a permit for the Virginia Beach pipeline on the ground, inter alia, that the Corps violated the National

Environmental Policy Act (NEPA), 42 U.S.C. 4332, by not preparing an EIS on the project.

2. The Roanoke River, whose tributaries arise primarily in the Appalachian Mountains of Virginia, flows southeast across the North Carolina border to Albermarle Sound. Pet. App. 78a-79a. River flow levels are regulated through a series of dams and reservoirs. The John H. Kerr Reservoir flows into Lake Gaston, which, in turn, empties into the Roanoke River. *Id.* at 79a.

Every spring, striped bass migrate up the Roanoke River to spawn. Pet. App. 112a-113a. The Corps, operating in cooperation with other entities, augments the flow of the Roanoke River during the spawning period in order to maintain a fixed minimum level on the river gauge at Weldon, N.C., where the striped bass come to spawn. *Id.* at 113a-114a.

On July 15, 1983, the Norfolk, Virginia, District Engineer of the Corps of Engineers received from Virginia Beach an application for a permit under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, and Section 404 of the Clean Water Act, 33 U.S.C 1344. Virginia Beach sought permission to construct a water intake structure and pipeline to draw off water from Lake Gaston for the City's use. Pet. App. 7a-8a. In October 1983, after holding three public meetings attended by approximately 6,000 people, the Norfolk District Engineer issued for public comment a draft environmental assessment (EA) and preliminary finding of no significant impact (FONSI). *Id.* at 80a-81a. A final EA and FONSI were issued in December 1983. In January 1984, the decision was made to grant the permit. At the same time, a statement of findings

addressing comments that had been received on the EA and FONSI was also released. *Id.* at 81a.[1]

3. The State of North Carolina then filed suit in the Eastern District of North Carolina against various officials of the Corps of Engineers and the Department of the Army, alleging violations of a number of federal laws, including NEPA, in connection with the Lake Gaston pipeline permits. Pet. App. 21a-43a, 45a-70a. Petitioner Roanoke River Basin Association, eight counties in North Carolina, and four counties in Virginia, were permitted to intervene as plaintiffs, and the City of Virginia Beach was permitted to intervene as a party defendant. See Pet. 14-15; Pet. App. 83a.

In July 1987, the district court upheld the Corps' decision against petitioners' challenges on all but two grounds. The district court remanded the matter to the Corps (1) to "make an independent assessment of the effects of the proposed project on striped bass to determine whether the preparation of an EIS is required or whether any mitigative measures are necessary; and, (2) [a]s part of its public interest review, [to] make a determination of the extent of

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[1] At the same time, the Wilmington, N.C., District Army Corps of Engineers was considering a request from Virginia Beach to enter into a contract pursuant to the Water Supply Act of 1958. Pet. App. 81a. This contract would reallocate to Virginia Beach 10,200 acre-feet of water storage space in the Kerr Reservoir which the city could release from Kerr Reservoir into Lake Gaston to offset the withdrawals through the pipeline from Lake Gaston. *Id.* at 81a-82a. The Wilmington District Engineer adopted the EA prepared by the Norfolk District Engineer and, on the basis of that EA, determined that an EIS was not required for entering into the contract. The contract was approved by the Assistant Secretary of the Army for Civil Works on January 30, 1984. *Ibid.*

Virginia Beach's water needs." Pet. App. 153a-154a; see also *id.* at 120a-123a, 134a-136a.

4. On remand, the Corps conducted a 17-month investigation of those issues. In June 1988, the Norfolk District Engineer issued a draft Supplemental Environmental Assessment (SEA) and FONSI for public comment. C.A. App. 1066. The SEA analyzed the decade-long decline in the Roanoke River's striped bass population, stating that, while flow in the river had some influence on juvenile recruitment, there was no evidence that flow patterns had anything to do with the post-1976 collapse in striped bass recruitment. It concluded that the depletion was the result of overfishing. *Id.* at 1080.

The SEA also found that, once every seven years, the Lake Gaston pipeline project might cause a loss of the last day of the period of augmented flow for striped bass spawning. C.A. App. 1071. It noted that the City could use its water storage capacity in the Kerr Reservoir "to ensure that [the pipeline] project would not cause any effect on stream flow during the striped bass spawning season." *Id.* at 1080. However, it concluded that "[e]ven if this storage were not used, it does not appear that the loss of the last day of the augmented spawning season flows every seven years due to the City's project would have any detectable effect, much less any significant effect, on striped bass spawning in the Roanoke River." *Ibid.*

In December 1988, following a review of the comments, the Norfolk District Engineer issued a final SEA, C.A. App. 1805, Supplemental Statement of Findings, *id* at 1829, and a revised Finding of No Significant Impact, *id.* at 1847. The Wilmington District Engineer adopted the Norfolk District SEA and issued its own FONSI. *Id.* at 1852. In his Supplemental Statement of Findings, the Norfolk

District Engineer stated that there was no indication that the project would have any impact on striped bass. *Id.* at 1838. The Engineer decided, as a precaution, to modify the City's permit to require that its additional storage in Kerr Reservoir be used to enhance flow during the period of the striped bass spawning so as to prevent "the loss of any augmented spawning flow days which would otherwise be caused by the City's withdrawal." *Ibid.*

5. The district court upheld the Corps' decision on remand based on the supplemental record. Pet. App. 74a. The court of appeals affirmed. *Id.* at 1a-28a. The court of appeals noted that "[a]n EIS must be prepared for any 'major Federal action significantly affecting the quality of the human environment,' "[2] *id.* at 11a (quoting 42 U.S.C. 4332), but explained that, "[i]f a mitigation condition eliminates all significant environmental effects, no EIS is required." Pet. App. 11a. After considering each of petitioners' objections to the Corps' analysis of the record, the court of appeals concluded that the Corps correctly determined that no EIS was required in this case. *Id.* at 11a-28a. The court held that there was adequate support in the record for the Corps' conclusion that the City's pipeline project would have no significant effect on striped bass, and that the "mitigation condition would eliminate the causes of the controversy." *Id.* at 13a.

ARGUMENT

The court of appeals carefully reviewed the extensive administrative record in this case and held that the Corps of Engineers "complied with all appro-

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[2] The court stated that "[t]he Corps has assumed that the project is a major federal action, and we shall defer to this determination." Pet. App. 11a.

priate statutory provisions" in issuing the permit at issue. Pet. App. 6a. That decision, which is not in conflict with the decisions of this Court or any other court of appeals, does not merit further review.

1. a. Petitioners argue (Pet. 26-29) that the court of appeals erred in upholding the Corps' decision to approve the Lake Gaston project because the Corps did not make the mitigation condition imposed on the City's permit available for public comment. No court has held that modifications to a proposed action made in response to a draft EA must be made available for public comment and, thus, there is no conflict on this issue.

An environmental assessment is not a document required by the terms of NEPA. These assessments are provided for by agency regulations as a device to help the agency decide whether the triggering event for NEPA—the existence of a proposal for "major Federal action significantly affecting the quality of the human environment"—has occurred. Only if a project is determined to have a significant environmental impact does NEPA require the agency to prepare an EIS and circulate it for public comment in draft form before issuing it in final form. See 42 U.S.C. 4332(2)(C).

The requirement that an EA be prepared is set forth in regulations of the Council on Environmental Quality (CEQ). 40 C.F.R. 1500.1 *et seq.* If, on the basis of the EA, the agency determines not to prepare an EIS, the agency is directed to prepare a finding of no significant impact and make that document available to the public. 40 C.F.R. 1501.4(e). However, these regulations do not require circulation of an EA—or any part of it—for public comment *before* the assessment is finalized or before a decision is made

whether to prepare an EIS or to issue a finding of no significant impact. 40 C.F.R. 1501.3-1508.9.[3]

In this case, the Corps did more than the regulations required and issued the environmental documents in draft form for public comment. The Corps imposed a mitigation condition on the City's permit in response to comments on the draft. There was no requirement, either in NEPA or in any of the regulations, that the modification be circulated for public comment before the final EA incorporating that condition was finalized.[4] Even if there were, however, the Corps would have complied with it. The proposal to use the City's enhanced storage capacity in the Kerr Reservoir to maintain spawning period flows was described in detail in a draft SEA that was made available to the public in June 1988. See C.A. App. 1065, 1071; Pet. App. 19a.

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[3] The Corps has issued its own regulations to implement NEPA for its regulatory programs. 33 C.F.R. Pt. 325, App. B. These regulations do not require that an EA be circulated for public comment. See 33 C.F.R. 325.7. Regulations governing the Corps' Civil Works Program require that a draft EA and FONSI be circulated for public comment in certain instances, but that regulation does not apply here. See 33 C.F.R. 230.11.

[4] Indeed, even in response to comments on an EIS—which the CEQ regulations require the agency to elicit on every draft—an agency may properly "[m]odify[] alternatives, including the proposed action" without eliciting a further round of comments on the modification. 40 C.F.R. 1503.4(a)(1). In addition, where an agency is involved in notice and comment rulemaking under the Administrative Procedure Act, 5 U.S.C. 553, it may normally modify proposed regulations in response to comments without circulating the modification for more comments. *City of Stoughton* v. *EPA*, 858 F.2d 747, 751, 753 (D.C. Cir. 1988).

b. Petitioners err in arguing (Pet. 26-31) that the court of appeals should not have upheld the Corps' approval of the Lake Gaston project because, contrary to case law in the Ninth Circuit, the Corps failed to explain how the permit condition would mitigate the impact of the project.

When an agency finds that an EIS is not required because certain conditions mitigate what otherwise might be significant environmental effects, the agency must explain how the measures will reduce the project's impact. But this merely follows from the requirement that the EA "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact." 40 C.F.R. 1508.9(a)(1). The Ninth Circuit cases cited by petitioners (Pet. 27) hold no more. See *LaFlamme* v. *FERC*, 852 F.2d 389, 399 (9th Cir. 1988) (agency failed to explain how the license conditions would mitigate the adverse environmental consequences); *Jones* v. *Gordon*, 792 F.2d 821, 829 (9th Cir. 1986) (agency provided no explanation of how project modifications would mitigate possible environmental effects); *Steamboaters* v. *FERC*, 759 F.2d 1382, 1392-1393 (9th Cir. 1985) (agency did not prepare EA and failed adequately to explain its finding of no significant impact).

In this case, the Corps found that, even if the City were not required to release water from its water storage in the Kerr Reservoir to restore any lost flow days, the project would still result in only one lost flow day every seven years. The Corps considered this effect to be *insignificant* for purposes of NEPA. Thus, measures to mitigate an otherwise significant impact were unnecessary, because there was no finding of significant impact to begin with. Nonetheless, the Corps imposed a condition that

would mitigate any possible effect of the project on the striped bass population, and discussed in the SEA how the requirement would accomplish that purpose. C.A. App. 1810. The court of appeals found this explanation to be adequate. Pet. App. 15a-20a. Petitioners fail to explain how the court misapplied the standard set by the pertinent CEQ regulation, which requires only that an EA "[b]riefly provide sufficient evidence and analysis" for a determination that a project's environmental effects will not be significant enough to warrant preparation of an EIS.[5]

2. Petitioners argue (Pet. 31-37) that the court of appeals' holding conflicts with *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n.4 (1974), because the court of appeals allowed the Corps to "shield[] crucial information until after it published its final decision." Pet. 32. The implication is that the Corps withheld documents that were available to it when it published its draft SEA and FONSI for comment in June 1988.

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[5] Even in the context of an EIS, this Court has held that mitigation measures need only be discussed to the extent necessary to ensure that environmental consequences have been fairly evaluated. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 352-353 (1989). And, even in an EIS, "NEPA does not require a fully developed plan detailing what steps *will* be taken to mitigate adverse environmental impacts." 490 U.S. at 359. In upholding the Corps' decision here, the court of appeals, at a minimum, complied with the standard set in that case.

In contending that the Corps' explanation of the mitigation condition was inadequate, petitioners seek to rely on comments submitted by parties to this case after the Corps made its final decision to approve the modified permit. See Pet. 29-31. As the City of Virginia Beach points out in its brief in opposition to the petition, at 26-28, those comments are not part of the administrative record in this case, and thus provide no basis for questioning the court of appeals' decision to uphold the permit.

In fact, the documents to which petitioners refer, see Pet. 32-33, were prepared in response to comments on the draft SEA and FONSI, and thus were not made public until after the latter documents were prepared. C.A. App. 1675, 1857.

In any event, the court of appeals' decision does not conflict with the decision in *Bowman Transportation*. That case involved a failure to permit comment in the context of a formal adjudication conducted under the APA. See 5 U.S.C. 554, 556-557. As this Court later held in *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 110 S. Ct. 2668, 2681 (1990), the procedural requirements imposed in *Bowman* apply only in the context of "formal adjudication pursuant * * * to the trial-type procedures set forth in §§ 5, 7, and 8 of the APA." Those Sections contain specific requirements for notice and opportunity for comment that go far beyond those imposed by NEPA or the regulations applicable to this case. 110 S. Ct. at 2680-2681. There is no requirement in NEPA, the CEQ regulations, or the pertinent Corps NEPA regulations that every document an agency considers in reaching a finding of no significant impact be made available to the public. In fact, CEQ regulations require only that the finding of no significant impact, not the EA, be made publicly available, 42 C.F.R. 1501.4(e)(1), and the Corps regulations require no

more. See 33 C.F.R. Pt. 325, App. B.[6] And, as in *LTV Corp.*, this is not a case where the Due Process Clause requires additional procedures, and petitioners do not suggest that it is. In the absence of a specific statutory or regulatory requirement, the failure to follow more elaborate procedures, where "the Due Process Clause itself does not require them * * * is therefore not unlawful." 110 S. Ct. at 2681.[7]

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[6] Petitioners cite 33 C.F.R. 325.3(a)(13) in support of their claim that the Corps' regulations vest in the public the right to all information available to the Corps prior to its final decision. Pet. 36-37. This regulation governs the issuance of Department of the Army permits generally and is not a part of the agency's NEPA regulations, contrary to petitioners' suggestion. Compare 33 C.F.R. Pt. 325 with 33 C.F.R. Pt. 325, App. B. Moreover, no court has held that these regulations require the agency to supply the public with all documents it develops in response to comments after the close of the comment period.

[7] With the exception of *Ely* v. *Velde*, 451 F.2d 1130, 1138 (4th Cir. 1971)—in which the court found that the agency completely failed to comply with the procedural requirements of NEPA—the courts of appeals cases cited by petitioners (Pet. 34 n.11) in their discussion of document disclosure involve either due process claims or specific procedural requirements found in other statutes: see *North Carolina Environmental Policy Institute* v. *EPA*, 881 F.2d 1250, 1258 (4th Cir. 1989) (proscription under APA of ex parte proceedings in connection with adjudication of a State's authority to administer a hazardous waste program); *South Carolina ex rel. Tindal* v. *Block*, 717 F.2d 874, 885 (4th Cir. 1983) (Secretary of Agriculture held to have complied with APA notice requirements in imposing milk price supports), cert. denied, 465 U.S. 1080 (1984); *Sierra Club* v. *Costle*, 657 F.2d 298, 318-336 (D.C. Cir. 1981) (procedures to be followed by EPA in preparing Economic Impact Statement under the Clean Air Act); *United States Lines, Inc.* v. *Federal Maritime Comm'n*, 584 F.2d 519, 534 (D.C. Cir. 1978) (requirement in informal adjudication that agency inform interested parties of the

3. Petitioners argue (Pet. 38-41) that, in not requiring the Corps to provide a complete analysis of the assumptions underlying the computer model used by the Corps in assessing the environmental effects of the pipeline, the court of appeals' ruling is contrary to decisions of the D.C. Circuit. However, none of the cases cited by petitioners (Pet. 38 n.14) is on point: they do not arise under NEPA, nor do they address the standards that apply to the analysis of technical models that are found in an EA or that are the basis of a finding of no significant impact.[8]

Petitioners also contend (Pet. 40) that the Corps should not have waited until the end of the comment period to disclose the computer model. Petitioners claim that, in rejecting their objections to late disclosure because they failed to demonstrate prejudice from the delay, the court reached a decision in conflict with *Small Refiner Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506, 540-541 (D.C. Cir. 1983). To the contrary, *Small Refiner* is entirely consistent with the court of appeals' ruling. As the D.C. Circuit explained in *McLouth Steel Products Corp.* v. *Thomas*, 838 F.2d 1317, 1324 (1988) (emphasis omitted), *Small Refiner* "put[s] th[e] burden on the challenger where the agency merely fail[s] to provide proper access to some supplemental study or studies

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basis for its decision); *McLouth Steel Products Corp.* v. *Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988) (agency "completely failed" to comply with APA notice and comment requirements in promulgating hazardous waste regulations under the Resource Conservation and Recovery Act).

[8] Although *Ely* v. *Velde*, 451 F.2d 1130, 1138-1139 (4th Cir. 1971), see Pet. 38-39, arose under NEPA, it does not support petitioners' argument. In that case, the agency had not prepared an EIS or an EA, and the decision does not address the use of predictive models.

that partially undergirded its rule." In *Small Refiner*, which dealt with EPA rulemaking under the Clean Air Act, the court held that it is "incumbent upon a petitioner objecting to the agency's late submission of documents to indicate with 'reasonable specificity' what portions of the documents it objects to and how it might have responded if given the opportunity." 705 F.2d at 540-541. The court also said that the petitioners must show that their comments would likely have made a difference had they been allowed to respond. *Id.* at 541. The court of appeals here, in essence, applied this standard and found that petitioners did not satisfy these requirements. Pet. App. 24a-25a. The court of appeals' decision is thus in full accord with decisions of the D.C. Circuit.

4. Finally, petitioners contend (Pet. 42-54) that the court of appeals erred in applying CEQ regulations for evaluating whether a proposed action "significantly affect[s] the quality of the human environment." Under CEQ regulations, the word "significantly" requires consideration of both context and intensity. 40 C.F.R. 1508.27. Ten factors are listed for evaluating "intensity"—which is a measure of the "severity of impact." *Ibid.* Petitioners argue that the court of appeals' holding conflicts with cases in other circuits interpreting three of these factors: "controversy," "uncertainty," and "cumulative impacts." However, the court of appeals' decision is fully consistent with the cases cited by petitioners (see Pet. 44-54) in which the courts have assessed these factors.

In deciding whether an action has "significant impact" for purposes of NEPA, one relevant factor is "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. 1508.27(b)(4). Petitioners err in

suggesting that the Ninth Circuit has articulated a firm rule that an EIS must be prepared whenever "commenting public agencies and others with expertise in the subject matter conclude that there may be a significant impact on the environment." Pet. 44. Rather, the Ninth Circuit has stated that "[t]he term 'controversial' refers 'to cases where a *substantial dispute* exists as to the size, nature, or *effect* of the major federal action rather than to the existence of opposition to a use.' " *Foundation for North American Wild Sheep* v. *United States*, 681 F.2d 1172, 1182 (9th Cir. 1982), quoting *Rucker* v. *Willis*, 484 F.2d 158, 162 (4th Cir. 1973) (emphasis added). See also *LaFlamme* v. *FERC*, 852 F.2d 389, 400-401 (9th Cir. 1988); *Sierra Club* v. *United States Forest Service*, 843 F.2d 1190, 1193 (9th Cir. 1988). The determination of whether a "substantial dispute" exists, in turn, is made on the basis of the entire record before the court; moreover, "controversy" is *one* of ten factors to be considered in determining whether a federal action meets the test of "significance."

For example, in *Foundation for North American Wild Sheep*, in finding that the agency's decision not to prepare an EIS was arbitrary and capricious, the Ninth Circuit did not rely on the presence of controversy *alone*. The court's discussion of "controversy" followed its finding that the agency failed to consider certain crucial factors (681 F.2d at 1178); that significant questions were raised in the draft EA that were ignored or shunted aside by the agency (*id.* at 1179); and that the mitigation measures were ineffective to reduce the impacts of the project (*id.* at 1180). Thus, its finding that the proposals were "controversial" was merely one factor in support of the court's conclusion that the project would have a

significant effect on the environment. *Id.* at 1180, 1182. Similarly, in *LaFlamme* v. *FERC*, 852 F.2d at 401, *Sierra Club* v. *United States Forest Service*, 843 F.2d at 1193, and *Jones* v. *Gordon*, 792 F.2d 821, 829 (9th Cir. 1986), the decisions do not rest on the mere expression of disagreement by other agencies; rather, the courts faulted the agencies' failure to deal with the underlying causes of the controversy by adequately addressing the substance of other agencies' objections. Here, in contrast, the court of appeals found that the Corps had responded to all significant objections to the pipeline project by imposing a mitigation condition that eliminated any possible adverse effects.[9]

In evaluating the "significance" of a project's environmental impact, an agency must also consider whether the effects of the proposal are highly uncertain or involve unique or unknown risks. 40 C.F.R. 1508.27(b)(5). Here, the court of appeals did not find that there was sufficient "uncertainty" to trigger the requirement for an EIS; that holding does not conflict with decisions that have applied the same legal standard in significantly different factual circumstances and have come to the contrary conclusion. See Pet. 49-50. Similarly, in finding that, on the record in this case, the Corps adequately evaluated "cumulatively

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[9] Petitioners also attempt (Pet. 46) to create a conflict with *Conner* v. *Burford*, 848 F.2d 1441, 1450 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989), in which the court stated that an EIS is required "as long as substantial questions remain regarding the effectiveness of the mitigation condition." Here, the court of appeals upheld the agency's finding of no significant environmental impact, and thus no need to prepare an EIS, even in the absence of the mitigation condition, thus rendering immaterial any contentions about the effectiveness of the mitigation condition.

significant impacts," 40 C.F.R. 1508.27(b)(7). see Pet. App. 22a-24a, the court of appeals' application of the "cumulative impacts" standard is fully consistent with decisions of other courts of appeals that have concluded, in other settings, that an agency gave insufficient consideration to a project's possible cumulative effects. Nor is there any tension between the court of appeals' decision and opinions of other appeals courts (see Pet. 52-53) that contain uncontroversial statements describing an agency's general obligation under the regulations to consider cumulative impacts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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